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Raising the Bar: Standards-Based Training, Supervision, and Evaluation

*Adele Bernhard**

I. CHANGES IN THE LEGAL PROFESSION THAT MAKE STANDARDS ESSENTIAL

I enrolled in the Criminal Defense Clinic during my third year at NYU Law School and immediately enjoyed criminal court practice. Motivated by the responsibility of client representation, I thrived in the fast pace and unpredictability of the courtroom. Even then, though, I contemplated how I might have structured the seminar differently had I been in charge of the clinic. I wondered how to better prepare students for their first interviews and court appearances. I thought about the benefits and detriments of supervision. Was it necessary or beneficial for me to feel quite so lost and overwhelmed? Should I really have been permitted to wander about town unsupervised, with a client accused of a string of scissor point robberies as we searched for Alternative to Incarceration programs? Were there guidelines or checklists designed to help me decide what steps ought to be undertaken for clients and when?

Since those first heady and terrifying days in criminal practice, I have considered how best to teach the practice of law. I have worked as a public defender, designed continuing legal education for private assigned counsel, taught trial advocacy to public defenders, created systems to evaluate defender organizations, assessed defender organizations and law schools, and guided a great many law students through their introduction to practice. I am convinced now of what I first thought when I began – it really is helpful to incorporate standards into training, supervision, and evaluation.

In this short Article, I sketch the methodology my colleagues and I at Pace Law School use to incorporate practice standards into our clinical teaching¹ and reflect on how a standards-based teaching paradigm could be

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1. Pace clinical teachers are not unique in our use of standards. In fact, I believe most clinical professors begin their courses by explaining to students what they hope the students will learn through the experience. In his *Best Practices for Legal Education*, Roy Stuckey and others place first among a list of best practices for experiential courses the suggestion that teachers “[p]rovide students with clear and explicit statements about the learning objectives [of their courses] and assessment criteria.” ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 168, (Clinical Legal Education Association 2007), available at <http://lawteaching.org/resources/books/bestpracticesforlegaleducation2007/stuckey-roy-bestpracticesforlegaleducation2007.pdf> [hereinafter BEST PRACTICES].

adapted to the training, supervision, and evaluation of public defenders. Then, I briefly consider how standards and standards-based teaching assist in the administration of assigned counsel plans and in the evaluation of the performance of public defender organizations. Although this Article does not cover any of these topics in depth, my goal is to introduce the reader to a standards-based approach to teaching and suggest that lessons from that model might be valuable for public defender offices.

The legal profession is growing and changing in ways that impact both law school curriculum and the responsibilities of public defenders. Each year more new lawyers graduate from school, take a bar examination, and join the profession.² The expansion of the profession correlates to the increased demand for legal services. Every day there is more legal work to do.³ States enact laws to regulate conduct that was never before regulated, in ways that were never previously conceived,⁴ and specialized agencies are formed to

2. See, e.g., AM. BAR ASS'N, ENROLLMENT AND DEGREES AWARDED, <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf> (last visited July 1, 2010) (demonstrating the increase in law degrees awarded from 1963-2009). The over 200 ABA-accredited law schools contribute to the growing number of new lawyers. See Charles Longley, *Law School Admissions, 1985 to 1995: Assessing the Effect of Application Volume*, in LSAC RESEARCH REPORT SERIES 2-6 (1998) (noting the increase in number of law school applicants and the subsequent increase in number of graduates); see also Carrie Menkel-Meadow, *Demographics and Social Structure, Issues Facing the Profession, Democracy in America*, available at <http://law.jrank.org/pages/18750/Lawyers.html#ixzz0nZWLFdZZ> ("There are almost 1 million lawyers in the United States in 2001, a three-fold increase in the last three decades. The United States is well known for having more lawyers than almost any other country. The ratio of population to lawyers has decreased from 695:1 in 1951 to 303:1 in 1995.").

3. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT] ("There has been an explosion in the Numbers of Users of Legal Services that began with the growth of law schools after the Second World War.").

4. The increased number and complexity of Motor Vehicle laws provides a good example. CAL. VEH. CODE § 12814.6 (West 2010) provides for a graduated licensing program for individuals between the ages of 16 and 18. California's statute provides for issuance of an instruction permit to individuals over the age of 16. *Id.* § 12814.6(a)(1). The holder of an instruction permit may drive a vehicle only when taking drivers' training instruction or when accompanied by a parent or guardian or a California licensed driver 25 years of age or older. *Id.* An individual must hold a permit for at least six months, must complete a driver education and training program, and must complete 50 hours of supervised driving practice (in addition to the driver education program) prior to the issuance of a provisional license. *Id.* § 12814.6(a)(3)-(4). A permit holder must also pass a driving exam in order to obtain a provisional license. *Id.* § 12814.6(a)(5). A provisional license holder may not do the following unless accompanied by a parent or guardian or a licensed driver over the age of 25:

oversee and manage the multiple and complex aspects of modern life.⁵ In the field of criminal law, current public safety strategy depends on police officers making numerous arrests – many for minor crimes that carry increasingly complex collateral consequences, including devastating immigration consequences.⁶

Working conditions for lawyers have also changed.⁷ Increasingly, lawyers concentrate on specific areas of law, keep detailed billing and work records, practice either in small or solo firms or in enormous multi-office firms, and confront complex ethical dilemmas – some created by the changes in legal practice.⁸ One of the most significant changes in the field is the reduction of training and supervision provided to new lawyers. This change has been brought about primarily by the increase in competition in the private sector and the decrease in funding, along with the increased need for legal services in the public sector.

In the past, law graduates could expect years of close and careful supervision at a law firm or through a clerkship. Now, many new lawyers join small firms or begin an independent solo practice immediately after passing the bar, shouldering the responsibilities of client representation right after graduation. Even as working conditions thrust new lawyers into challenging situations ever earlier in their development – in public defender offices and elsewhere – the availability of post-graduation training and supervision has decreased.⁹

(1) drive between the hours of 11 p.m. and 5 a.m. or (2) transport passengers under 20 years of age. *Id.* § 12814.6(b)(1). Certain exceptions apply such as medical necessity, employment, or schooling. *Id.* § 12814.6(b)(2). *See also* N.J. STAT. ANN. § 39:3-13 (West 2010); MICH. COMP. LAWS ANN. § 257.310 (West 2010).

5. A range of trades require special licenses and registration. Forming a business requires legal assistance, as does buying a piece of property.

6. In 2009, NYC police effectuated more than 575,000 stops of people in the city, a record number of what is known in police parlance as “stop and frisks.” Al Baker, *City Minorities More Likely to Be Frisked*, N.Y. TIMES, May 13, 2010, at A1; *see also* K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 274-75 (2009).

7. *See, e.g.*, MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 83 (Farrar, Straus and Giroux 1994) (“Today’s lawyers wander in an increasingly impersonal, bureaucratized legal world, where neither honesty-based nor loyalty-based systems seem to be operating . . .”).

8. Robert Stein, *The Future of the Legal Profession*, 91 MINN. L. REV. 1, 5 (2006) (“The management and economics of law practice have also changed dramatically” in the late twentieth century.).

9. Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 388-89 (1997) (“Although some public defender programs provide training to new lawyers before they start handling cases, most do not.”).

Today's new lawyers likely need more assistance learning the business and the art of practicing law, but they are instead expected to do more on their own. The greater number of professionals working in solo or small firm practice without mentors or in large, impersonal bureaucracies with little guidance, coupled with the increasing complexity of legal work, has generated problems. Lawyers suffer from depression and anxiety – perhaps more than other professionals.¹⁰ And each year there are disaffected clients unhappy with services rendered as well as with the cost of those services.¹¹ These conditions impede performance. It is difficult for busy, pressured, defensive, poorly trained, and poorly supervised lawyers to perform at their best.¹² One countervailing force amid the relentless pressures adversely impacting performance is what I call the “Standards Movement.”¹³ Standards provide clear

10. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 873-74 (1999).

11. In 1992, an ABA report on lawyer discipline complained that:

The existing system of regulating the profession is [too] narrowly focused on violations of professional ethics. It provides no mechanisms to handle other types of clients' complaints. The system does not address complaints that the lawyer's service was overpriced or unreasonably slow. The system does not usually address complaints of incompetence or negligence except where the conduct was egregious or repeated. It does not address complaints that the lawyer promised services that were not performed or billed for services that were not authorized. Some jurisdictions dismiss up to ninety percent of all complaints.

COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY xv (1992).

12. Katherine Mangan, *Law Schools Could Take a Hint from Medical Schools on Curriculum Reform*, CHRONICLE OF HIGHER EDUCATION, April 27, 2010, available at <http://chronicle.com/article/Law-Schools-Could-Take-a-Hint/65264/?key=Gj4iI1hvZ-nZPZXplfCEXe3BXbyYrJU54b3QSYHkabVpR> (“The nation's legal-education system needs a major overhaul so that students graduating with more than \$100,000 in debt can find jobs in a shrinking market and graduate ready to practice. That was the consensus of most of the nearly 100 judges and law-firm partners who converged at a forum this week sponsored by Arizona State University's Sandra Day O'Connor College of Law. Participants in the ‘National Forum on the Future of Legal Education’ said law schools should emulate medical schools and transform the third year into clinical rotations, so that students know the nuts and bolts of being a lawyer by the time they graduate. Such changes are needed, they said, at a time when law firms are hiring fewer lawyers, and clients are less willing to pay for young associates to gain on-the-job training with their cases Many of those who shared ideas at the forum were adjunct law professors or lawyers who had previously taught law. But they were dispensing advice as law-firm partners and judges who hire and work with young lawyers, who they said often lack the analytical and writing skills they need to be effective their first year out of school.”).

13. See, e.g., Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 274-275 (2004). Wallace and Car-

and explicit guidance for lawyers. Standards dissect complex responsibilities and present them as the sum of manageable pieces. Standards make comprehensible what judicial decisions often make incoherent.¹⁴ The ABA Criminal Justice Section *Criminal Justice Standards*, for example, provides a comprehensive list of lawyering tasks for defense attorneys and prosecutors.¹⁵ The *Standards* were first approved in 1969 after being drafted by the Criminal Justice Section of the American Bar Association.¹⁶

Warren Burger, chair of the Standard's project until his appointment as chief justice of the U.S. Supreme Court in 1969, described the Standards project as "the single most comprehensive and prob-

roll report that "[i]n mid-1999 and again in mid-2000, OJP convened national symposia on indigent defense, in which the utilization of uniform standards played a prominent role. The official report on the 1999 symposium states that indigent defense standards 'are the most effective means of ensuring uniform quality of indigent defense services.'" *Id.* at 251 (quoting *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations*, REP. OF THE NAT'L SYMP. ON INDIGENT DEF. (Dep't of Justice, Office Of Justice Programs, Washington D.C.), Mar. 2010, at x). Then the authors surveyed defender offices to assess the impact of standards on the quality of services provided. *Id.* at 253-54.

Two types of standards were principally credited with producing improvements in attorney training. The most significant association was with standards requiring and defining adequate training (44.1%). A lesser proportion (26.3%) attributed improved training to standards requiring adequate defense resources. The implication is that it is an agency's articulated commitment to the importance of training, rather than dollars alone, which leads to improved training.

....

The types of standards contributing most strongly to improved quality of public defense services to clients were roughly tied, between attorney performance standards (53.6% of the jurisdictions with such standards reported that they had resulted in quality improvement) and attorney training standards (52.9%).

Id. at 274-75. See also Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards!*, 51 WAYNE L. REV. 129, 147-49 (2005).

14. State and national standards were gathered into the first-ever national Compendium of Standards for Indigent Defense Systems by the U.S. Department of Justice, with NLADA assistance, in 2001. See NLADA.org, Compendium of Indigent Defense Standards, http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp (last visited June 27, 2010) [hereinafter OJP Compendium]. This five-volume work was posted on OJP's web site and distributed in a CD-ROM to thousands of state and local elected and appointed policy makers, funding agencies, judges, public defense agency leaders, and law libraries. See *id.*

15. AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) [hereinafter STANDARDS FOR CRIMINAL JUSTICE].

16. *Id.* at 3.

ably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history” and recommended that “[e]veryone connected with criminal justice . . . become totally familiar with [the *Standard*’s] substantive content.”¹⁷

I am consistently surprised, however, at how infrequently defense attorneys use the *Criminal Justice Standards* to perform at a higher level. I am convinced that incorporating standards into the training, supervising, and evaluating of new defense attorneys will improve the quality of criminal defense services. My belief derives from my own experience using standards to teach law students.

II. USING STANDARDS TO TRAIN STUDENTS TO BE LAWYERS

I have spent the last 17 years as a clinical law teacher. My students learn the practice of law by practicing law. Currently, I direct a Post-Conviction Innocence Project.¹⁸ I identify cases where clients make a persuasive claim that they have been wrongly convicted and where I hope that my students and I will find new evidence of innocence that was not presented to the jury at the client’s trial. Until recently, I taught a criminal defense clinic. In that clinic, my students represented clients charged with misdemeanor cases in criminal court. In each of these teaching experiences, I work alongside colleagues at the law school who supervise students handling a range of cases involving immigration, investor rights, disability, education, and environmental law.

Although student attorneys enrolled in the clinical programs at Pace Law School handle many kinds of cases in a variety of administrative and judicial forums, all the clinical teachers introduce our students to the practice of law in the same way. In addition to identifying appropriate cases, assigning them to students, and creating a syllabus of readings, we begin each semester by distributing the *Report of the Task Force on Law Schools and the Profession, Narrowing the Gap* – commonly known as the “MacCrate Report” after Robert MacCrate, the chair of the task force that drafted the treatise.¹⁹

The MacCrate Commission was charged with bridging the purported “gap” between teaching and practicing law.²⁰ Its work was motivated in part

17. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST. (Winter 2009), at 10, 10 (quoting Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974)).

18. Pace Law School, Criminal Justice Clinic: Post-Conviction Project, http://www.pace.edu/page.cfm?doc_id=23717 (last visited June 27, 2010).

19. See MACCRATE REPORT, *supra* note 3.

20. See *id.*

by the changing conditions of practice. Pressed for time, firms didn't want the responsibility of training law graduates in practical skills and also complained that graduates weren't prepared to practice law. The firms needed "practice ready" lawyers, but the graduates they were hiring didn't know how to write a simple contract or file an answer, and they had never been to court. Law students, as well, were disappointed to learn upon graduation that they had paid high tuition costs for an education that did not transmit the basic skills they would need to engage in their professional work.²¹

The MacCrate Commission defined its role as articulating the skills and values required for competent lawyering, which, according to the Commission, develop "along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer's professional career."²² The MacCrate Commission also identified ten "Fundamental Lawyering Skills" and four "Fundamental Values of the Profession" that every lawyer should acquire before assuming responsibility of a legal matter and compiled them in what the Commission called a "Statement of Skills and Values."²³ The skills are problem solving; legal analysis and reasoning; legal research; factual investigation; communication; negotiation; litigation and alternative dispute resolution; organization and management of legal work; and recognizing and resolving ethical dilemmas.²⁴ The values are provision of competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional self-development.²⁵ These skills and values are a simple and clear set of performance standards for legal educators to use as targets – a starting point for best practices. Skills and values are also widely used by clinical teachers in law schools across the country.²⁶

In part as a result of the MacCrate Commission's work, law schools offer more skills-based courses than they previously offered.²⁷ Almost every

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See generally Russell Engler, *The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109 (2001); Arturo López Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998).

27. See Jill Schachner Chanen, *Re-Engineering the JD*, A.B.A. J., July 2007, at 42, 42; see also Jonathan D. Glater, *Training Law Students for Real-Life Careers*, N.Y. TIMES, Oct. 31, 2007, at B9. The work of the MacCrate Commission has been taken up and reinforced by subsequent studies. The Carnegie Report published in 2007 also concludes that legal educators must do more to "bridge the gap between analytical and practical knowledge" and that the traditional method of teaching in law schools does little to prepare the student for the practice of law. William M. Sullivan

student studies trial advocacy or enrolls in an interviewing and negotiating course.²⁸ More schools make available experiential education opportunities where students can practice law under skilled supervision while still in school. Although change in the law school curriculum has not been as rapid or as pervasive as many law professors have desired,²⁹ the Commission's identification of the essential lawyering skills and values has enormously impacted law school education. Explicit identification of the skills and values intrinsic to the work of providing legal services permits professors to focus on the full range of skills their students need for practice (beyond reading and understanding appellate level court decisions) and assists in the communication and transfer of those skills.³⁰

In Pace Law School clinics, students and professors review the lawyering skills identified in the MacCrate Report. Professors explicitly discuss how the students' work requires the identified skills and how the work will help build professional identity and values. Every course focuses on developing skills. As we think about practice and reflect on the skills we are learning, we refer back to the MacCrate Report so that we are aware of which skills we are using in our work and how each of those specific skills fit into the total panoply of lawyering.

Not only do we teach and practice skills such as interviewing, negotiating, writing, and persuasive argument, but we also teach and practice consciously – reflecting on how we teach and whether we are meeting our teaching goals. We identify the skills we teach, practice the skills in seminar, and reflect on the teaching, practice, and acquisition of those skills – making explicit the concept that each skill and value is a building block essential to professional excellence. The clearer and more explicit we are in our teaching, the better the students will be in their learning and in their practice. Clinical teachers have learned that every task is easier to master if it is clearly described, deconstructed, discussed, and practiced.

For example, clinical professors dissect lawyering skills into their component parts. When we discuss interviewing, we discuss building rapport

et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 13, 76 (2007).

28. Chanen, *supra* note 27, at 44.

29. Despite the conceptual breakthrough provided by the MacCrate Report, law school teaching has mostly changed around the edges. Simulation and experiential courses have been added, but they are not required for graduation and they are not seen as essential to learning the practice of law. For the most part, information is still transmitted by a professor standing at the front of a large classroom, orchestrating a discussion about appellate cases among a subset of the class.

30. Mangan, *supra* note 12 (“The American Bar Association’s accrediting arm is considering changes to its accreditation standards that would address [concerns about the skills of law graduates]. One of the more controversial proposals being considered would require schools to measure how well their graduates had mastered specified skills.”).

with clients, obtaining information, communicating information, asking questions, and listening. When we speak about negotiating, we discuss assessing possible options, ranking those options, considering strategy, beginning a conversation, putting an offer on the table, and reaching an agreement. Finally, throughout the semester, we try to carve out time to reflect on our work. We ask the students to consider what they hope to achieve for the clients as well as what they hope to achieve for themselves. We push the students to reflect on their work and growth and to set specific goals for themselves.³¹

At the end of the semester, professors evaluate their students with reference to the same list of skills and values introduced at the beginning. We draft written evaluations addressing student progress in each of the essential skills.³² And, if I've done my job well, my clinic students will have assisted clients; learned a great deal about the criminal justice system, the causes of wrongful conviction, and New York Criminal Procedure; and, most importantly, acquired a set of skills, an appreciation of what they have achieved, and a method for continual self-improvement. Even if my students never again practice in the criminal courts, skills learned in the criminal courts transfer to many other types of legal settings that require client interaction, litigation, and oral advocacy. Students appreciate the value of the skills, see them as essential to the art and practice of lawyering, and understand that they have begun a lifetime of self-teaching, reflection, and continual improvement.³³

Law school clinical teaching is replicable. Our focused attention on explicit skills and values training can be duplicated in any setting, but it is particularly well suited for public defender training. The legal profession possesses the tools to improve defender training, supervision, and evaluation. There is no excuse for failure to use those tools to improve defender training. Public defenders perform essential services for their clients and the public. They deserve excellent training, supervision, and evaluation.

31. See, e.g., Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335 (2010) (discussing the Clinical Program at Drake University Law School).

32. BEST PRACTICES, *supra* note 1, at 175 ("The goals and methods we select for assessment directly affect student learning. 'Assessment methods and requirements probably have a greater influence on how and what students learn than any other single factor. This influence may well be of greater importance than the impact of teaching materials.'" (citing ALISON BONE, NAT'L CTR. FOR LEGAL EDUC., ENSURING SUCCESSFUL ASSESSMENT 3 (Roger Burridge & Tracey Varnava eds., 1999), <http://www.ukcle.ac.uk/resources/assessment/bone.pdf>)).

33. See generally Gerald F. Hess, *Learning to Think Like a Teacher: Reflective Journals for Legal Educators*, 38 GONZ. L. REV. 129 (2003).

III. USING STANDARDS IN PUBLIC DEFENDER TRAINING, SUPERVISION, AND EVALUATION

Public defenders are indispensable to the operation of the criminal justice system.³⁴ Defense lawyers find evidence and build arguments that raise reasonable doubts and free the innocent who are mistakenly charged with crimes. They raise legal arguments regarding admissibility of evidence, question the reliability of novel scientific theories, and challenge police and prosecutorial misconduct that would otherwise go unnoticed. Defenders gather mitigation evidence to present the full complexity of a client's character to the court and confront the trustworthiness of the prosecution's evidence – all tasks essential to the truth-finding function of the criminal justice system. When those responsibilities are shirked, misunderstood, or rendered impossible to fulfill, the whole system suffers. “In every study of wrongful convictions, investigators inevitably conclude that ineffective assistance of counsel – bad lawyering – is an important factor in unjust convictions.”³⁵ For example, of the thirteen men originally sentenced to death in Illinois who were exonerated between 1987 and 2001, “four were represented at trial by an attorney who had been disbarred or suspended.”³⁶ The Innocence Project found that 27% of the first 68 wrongfully convicted individuals whose con-

34. See *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932):

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

35. Adele Bernhard, *Effective Assistance of Counsel*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 220, 220 (Saundra D. Westervelt & John Humphrey, eds., 2001). See also William S. Sessions, *Death Penalty: Osborne Sentence a Stain on Justice*, *ATLANTA J. CONST.*, June 3, 2008, at A11 (Curtis Osborne was executed as the result of a death penalty conviction because his defense attorney, Johnny Mostiler, refused to inform him of a plea offer that would have spared his life.).

36. Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, *CHI. TRIB.*, Nov. 15, 1999, at 1. See also BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 187 (2000).

victions the Project helped to reverse had “subpar or outright incompetent legal help.”³⁷

Moreover, law schools tout public service, encouraging our nation’s best, brightest, and most dedicated young attorneys to serve the poor as public defenders, legal services attorneys, or as government sector attorneys.³⁸ The young professionals who make a choice to use their skills and talent in public service have many career choices upon graduation. Despite more lucrative opportunities, many commit to public service – an ever more difficult decision in the face of the increasing differential between public and private sector jobs.³⁹ Frequently, pressed by too many cases, undervalued by the public, and saddled with debt,⁴⁰ they nonetheless strive to ensure fairness in the criminal justice system upon which we all depend. The legal profession owes them our support.

37. SCHECK ET AL., *supra* note 36, at 187.

38. Sharon H. Fischlowitz & Peter B. Knapp, *From Here to Next Tuesday: The Minnesota Public Service Program, Ten Years After*, 26 HAMLINE J. PUB. L. & POL’Y 223 (2005) (discussing Minnesota’s public service program for law students – all four Minnesota law schools participate in the program, and students at these law schools are encouraged by their law school (and the program) to participate in public service programs and coursework offered by the schools); Leigh B. Middleditch, Jr., *SLD Public Service [Part Four]*, EXPERIENCE, Summer 1998, at 3 (discussing how some law schools, such as University of Virginia, have established public service loan assistance programs to encourage graduates who have law school loans to enter low-paying public service jobs); Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 42 (2000) (mentioning how the ABA amended its accreditation standards in 1996 to call on schools to encourage students to participate in pro bono activities and to provide students with opportunities to do so); David Hall, *The Law School’s Role in Cultivating a Commitment to Pro Bono*, BOSTON B.J., May-June 1998, at 4 (discussing Northeastern University School of Law’s attempts to encourage and instill the values of pro bono and public service work in its students).

39. Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 833 (1995) (“[T]he decisions of law school graduates are driven principally by the relative incomes in the different sectors of the profession, as well as by their race, performance in law school, and career plans. . . . The greater the income gap between the for-profit and not-for-profit sectors, the more likely it is that graduates will choose the former.”).

40. See, e.g., Howard Manweiler, *Are Student Loans Getting Out of Hand?*, ADVOCATE (IDAHO), Apr. 1996, at 6; M. Scott Carter, *Survey: Oklahoma Law School Grads Face Big Bills*, J. REC., Jan. 8, 2010, available at 2010 WLNR 945245.

A. *Performance Standards in Public Defender Training, Supervision, and Evaluation*

To provide quality services, public defender offices need adequate funding, political independence, support, and a voice at the table when criminal justice decisions are made.⁴¹ Most public defender offices lack necessary political and popular support,⁴² few offices are sufficiently funded,⁴³ and fewer still are consulted when important criminal justice decisions are made by local governments. Nonetheless, despite these impediments, which impede a public defender office's ability to provide quality representation, every public defender office has some capacity to control the quality of practice provided by its staff. Every public defender office can refuse to accept more clients than its lawyers can ethically and responsibly represent,⁴⁴ back up its lawyers should they feel compromised by too many cases, and aid them in practicing competently. One cost-free way a public defender office can support its lawyers is by creating and using performance standards.⁴⁵

41. See, e.g., AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/t-enprinciplesbooklet.pdf> [hereinafter TEN PRINCIPLES] (promulgated by attorney members of the committee with either current or previous public defender experience).

42. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993); Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1 (1999).

43. The overwhelming difficulties faced by public defender offices are most recently and thoroughly described in THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/manage/file/139.pdf>, and ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf).

44. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006) (clarifying the ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation). Defenders must refuse the assignment of additional cases when their existing caseloads are so great as to prevent them from providing competent representation. *Id.*

45. In addition to the ABA Criminal Justice Section's CRIMINAL JUSTICE STANDARDS, the National Legal Aid and Defender Association has promulgated PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995), which defines good, solid trial lawyering for public defenders. Both are available at no cost on the organization's website, at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines. See also NAT'L LEGAL AID & DEFENDER ASS'N, TRAINING STANDARDS (2007), available at http://www.nlada.org/Defender/Defender_Standard-

Adapting available materials,⁴⁶ every public defender office or assigned counsel panel should create a set of performance guidelines tailored for and developed by its own staff. Those guidelines could incorporate what the office considers to be best practices and values.⁴⁷ These guidelines might lay out and describe the range of activities a defense attorney undertakes on behalf of clients. The guidelines could be detailed or general. At a minimum, they should cover client communication, negotiation, ethics, diversionary approaches to cases, fact investigation, motion practice, trial practice, sentencing, and collateral consequences. The guidelines should also detail case management requirements and time keeping essentials. Clearly, caseload limits should be a part of any set of performance standards, for no lawyer can function with too many cases.⁴⁸

The standards promulgated by the Georgia Public Defender Standards Council serve as one example of extensive attorney performance standards. The Council describes itself as “an independent agency within the executive branch of the state government of Georgia.”⁴⁹

The mission of the Georgia Public Defender Standards Council is to *ensure, independently of political considerations or private interest*, that each client whose cause has been entrusted to a circuit public defender receives zealous, adequate, effective, timely, and ethical legal representation, consistent with the guarantees of the Constitution of the State of Georgia, the Constitution of the United States and the mandates of the Georgia Indigent Defense Act of 2003.⁵⁰

s/Defender_Training_Standards. Other examples of performance standards can be found in the OJP Compendium, *supra* note 14.

46. OJP Compendium, *supra* note 14.

47. Massachusetts Committee for Public Counsel Services provides a set of practice guidelines for private practitioner who joins the assigned counsel plan administered by PCS. This manual is a wonderful example of using standards to provide every lawyer with the baseline of what's expected from a practitioner. *See* Assigned Counsel Manual, http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_index.html (last visited July 2, 2010). *See also* Georgia Public Defender Standards Council – Training, <http://training.gpdsc.com> (last visited June 30, 2010).

48. *See supra* note 44.

49. *See* Georgia Public Defender Standards Council – Our Mission, <http://www.gpdsc.com> (last visited June 30, 2010).

50. *See id.*

1. Training

Most large public defender offices in major urban areas provide training for new lawyers.⁵¹ Often, training programs are extensive multi-week sessions with simulation and role play.⁵² Many offices also provide continuing legal education for their staff.⁵³ Because training introduces lawyers to the accepted norms of practice, training sessions could easily and productively incorporate standards.⁵⁴ Ideally, training would focus on all skill sets and incorporate a variety of educational techniques. No matter what style of training the office uses – whether role play exercises, moot court arguments, practice writing sessions, or brainstorming sessions – it is essential to make explicit which skills are being developed, how those skills will be used in practice, and where they are described in the office's standards. If the office manual requires every client to be interviewed prior to the first court appearance, for example, training should teach interviewing skills. Public defender officer leaders should discuss interviewing techniques and goals. There should also be opportunity for the attorneys to consider the difficulties that will arise in the interviewing context. Some of these difficulties include whether it will be challenging to conduct the interview in the detention setting; whether the court will pressure defenders to conduct their interview too rapidly; and whether there will be a confidential space in which to conduct the conversation.

If the performance standards require that a bail application be made in every appropriate case, defender offices should focus their training on bail applications. Bail training might identify the statute that permits the applica-

51. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 15, at 2.6 (requiring training).

52. See, e.g., Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Value-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 161-62 (2009) (discussing the Georgia Public Defense Council's Honors Program for training as a successful model to use); see also State of Wisconsin Office of the State Public Defender, Materials From the SPD Training Programs, <http://www.wisspd.org/html/training/ProgMaterials> (last visited June 16, 2010). See generally Kentucky Department of Public Advocacy - Education, <http://dpa.ky.gov/ed/> (last visited June 16, 2010); The National Criminal Defense College – Trial Practice Institute, <http://www.ncdc.net/tpi/index.html> (last visited June 16, 2010).

53. See *2010 Public Defender Service for the District of Columbia Criminal Defender Training Program Summer Series* (Pub. Defender Serv. for the D.C.), June-July 2010, available at <http://www.pdsdc.org/Resources/SUMMERSERIES/2010RegistrationMaterials.pdf>.

54. The National District Attorneys Association in Alexandria, Virginia publishes the National Prosecution Standards. Nat'l Prosecution Standards (2010), available at <http://www.pretrial.org/Docs/Documents/NDAA%202010%20Standards.pdf>. Prosecution Standards recognize the importance of training, supervision, and monitoring in the prevention of prosecutorial misconduct. *Id.*

tion, the styles and preferences of the judges before whom counsel will make the applications, the available options for bail funding, and techniques for contacting family and other supporters who might convince the court that the client is a good bail risk. In all of the training, teachers should refer to the performance guidelines so that the new lawyers will understand what they are doing and how they are doing it. Standards should provide a framework that facilitates growth in skills and professionalism.

2. Supervision

Defense providers are responsible for supervising staff to ensure staff catch their mistakes and learn from them. Supervision is not only essential to ensure clients are well served but also to guarantee that lawyers progress professionally. Supervisors must provide a safe space for lawyers to discuss cases about which they are worried and to discuss problems that resist solution. Supervisors should also refer to the office performance guidelines in conversations with staff, enforcing office standards and values. Supervisors should communicate that they will support their staff's work undertaken to achieve competence.

Defender office leaders should supervise their staff and encourage them to reflect on their performance and progress.⁵⁵ Understanding how to learn from mistakes as well as from the mistakes of others is essential to a lawyer's life-long learning and to the creation of a learning environment where staff feel free to discuss their questions and uncertainties. Supervisors must encourage staff to discuss mistakes. There is simply no way to be perfect in a field as demanding and pressured as public defense. Mistakes provide learning moments. Unfortunately, most lawyers do not see their mistakes as platforms from which to learn but as embarrassments to bury. If staff do not reveal their errors, supervisors will be prevented from correcting the situation or from using the mistakes as a platform for learning. Performance guidelines prove a neutral yardstick by which to facilitate conversation.

3. Evaluation

To learn and progress, lawyers need evaluation as well as supervision. Lawyers, as a profession, tend to avoid self-evaluation. But there is simply no excuse for this lack of reflection – especially when there are performance guidelines that provide yardsticks to measure actual performance. Public defenders need careful assessment in order to improve their skills and to

55. Filippa Marullo Anzalone, *It all Begins with You: Improving Law School Learning Through Professional Self-Awareness and Critical Reflection*, 24 *HAMLIN L. REV.* 324, 336-37 (2001).

progress as lawyers. Public defender clients deserve counsel who receive continual assistance in becoming better lawyers.⁵⁶

In order to provide useful feedback to staff, supervisors should identify concrete measures, which they believe will provide information about how staff is meeting standards. For example, a defender's client communication skills could be evaluated by looking at notes in the file, observing how the defender speaks to clients, or even interviewing clients to determine how much they understood. Counseling could be measured by how frequently a defender inquires about the underlying causes driving clients to commit crime and how often the defender refers clients to treatment, counseling, a housing specialist, an immigration specialist, or other services. In addition, client surveys might provide useful information about how staff is meeting performance guidelines. Legal research skills could be evaluated by reading motions and memorandum. Finally, aptitude in oral advocacy could be measured by court observation and simulated practice sessions.

B. *Qualification Standards for Appointment to Cases*

A second kind of standard is the "qualification" or "eligibility" standard. Eligibility standards ensure that attorneys satisfy a set of prerequisites before assignment to cases. Eligibility standards are helpful in jurisdictions that depend on private counsel who are assigned to represent poor people charged with crime. For example, when New York state re-enacted capital punishment, the statute authorizing capital punishment also required the creation of a Capital Defender Office (CDO).⁵⁷ By statute, the CDO was given responsibility for ensuring that poor defendants charged with capital offenses received effective assistance of counsel.⁵⁸ To that end, the CDO promulgated standards attorneys were required to meet for appointment to capital cases.⁵⁹ The CDO reviewed applications of attorneys who wished to be assigned such cases and selected counsel for assignment only when their experience and prior work product assured the CDO that they could effectively meet the challenge.⁶⁰

56. See generally Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335 (2010).

57. Capital Defender Office, <http://www.nycdo.org/> (last visited June 30, 2010); see also 1995 N.Y. Sess. Laws Ch. 1 (McKinney).

58. Capital Defender Office, *supra* note 57.

59. *Id.*

60. *Id.* For an example of state statutes ensuring appointment of appropriately experienced counsel, see Indiana Standards for Indigent Defense Services in Non-Capital Cases (Standard E), available at <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf>; KAN. ADMIN. REGS. § 105-3-2 (2000). For ensuring fair rotation of assignments, see the former Georgia Indigent Defense Council's GA. GUIDELINE FOR THE OPERATION OF LOCAL INDIGENT DEF. PROGRAMS 2.4, available at <http://www.mynlada.org/defender/DOJ/standardsv1/v1h.htm>. See also Com-

In the non-capital setting, the Assigned Counsel Plan in New York State's First Judicial Department (Bronx and Manhattan) also developed a rigorous set of eligibility guidelines.⁶¹ In the First Department, attorneys who seek assignment to criminal cases must apply to any one or to all of the assigned counsel panels.⁶² The panels are divided by seriousness of the cases.⁶³ As such, there are misdemeanor, felony, complex felony, and homicide panels.⁶⁴ The more challenging or severe the class of crime, the more extensive experience the applicant must have in order to be assigned to the category of case.⁶⁵ The First Department Assigned Counsel Plan also conducts training and periodic evaluation of the panel attorneys.⁶⁶

C. Using Organizational Standards to Evaluate Defense Delivery Systems

Performance standards describe the work that an attorney undertakes on behalf of clients. Eligibility standards ensure that attorneys have the requisite experience and training to be assigned cases. "Organizational standards" provide benchmarks for assessing the quality of an organization's work. Organizational standards ask whether the office as an institution is ensuring that its lawyers provide quality services to clients.

Accrediting bodies use organizational standards to evaluate institutions. For example, the American Bar Association's Section on Legal Education and Admission to the Bar is the accrediting agency for law schools.⁶⁷ The process of accreditation begins with the law school under review drafting a self-study that describes how the school complies with or fails to comply with the *Standards and Rules of Procedure for Approval of Law Schools*, promulgated by the Council of the Section.⁶⁸ "The Standards establish requirements

pendium of Standards for Indigent Defense Systems: Introduction, <http://www.mynlada.org/defender/DOJ/standardsv1/v1intro.htm> (last visited July 1, 2010).

61. *Application for Panel Membership* (Assigned Counsel Plan for the First Judicial Department), available at http://www.nycourts.gov/courts/ad1/Committees&Programs/18B/18B_Application%20for%20Panel%20Membership.pdf (last visited June 17, 2010).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Adele Bernhard, *Private Bar Monitors Public Defense: Oversight Committee Sets Standards for Indigent Defense Providers*, CRIM. JUST., Spring 1998, at 24.

67. See Accreditation Processes, <http://www.abanet.org/legaled/accreditation/acinfo.html> (last visited Aug. 19, 2010).

68. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, THE LAW SCHOOL ACCREDITATION PROCESS 5, available at http://www.abanet.org/legaled/resources/13665_ABA_accred_web150.pdf (last visited Aug. 19, 2010).

for providing a sound program of legal education.”⁶⁹ The accrediting team assesses the institution under review against the *Standards*.

A similar process might easily and productively be established to evaluate and monitor public defense services. Evaluation would serve multiple goals. First, it would satisfy the public that public revenues are being wisely spent. Taxpayers bear the cost of providing defense services and have a right to expect that costly and important legal services are reviewed for quality. Moreover, both defenders and their clients would benefit from systematic professional oversight. But, unfortunately, lack of oversight is consistently cited as one of the most pressing structural defects in indigent defense systems.⁷⁰

Lack of oversight does not have to be the norm. Some jurisdictions provide oversight through a state-wide defense commission organized for that purpose.⁷¹ In other jurisdictions, oversight is provided by the defense provider itself, and, in others, it is provided by a court committee.⁷²

Defenders can debate the most appropriate authority and design for an overseeing body. However, everyone would agree that, to have legitimacy, oversight should be provided by an accomplished and respected group of knowledgeable practitioners, who would, as a first step in the evaluation process, compile a set of standards acceptable to the defense providers in the jurisdiction. Organizational standards exist, and defender offices or defense commissions could use a variety of different assessment models. The ABA Ten Principles of a Public Defense Delivery System are an example of organizational standards for criminal defender offices.⁷³ The ABA Ten Principles demand that public defender offices, among other requirements: maintain independence from the judiciary as well as from their funding source; that offices screen clients for financial eligibility; that offices ensure staff attorneys have sufficient time and a confidential space to meet clients; that staff

69. *Id.* at 3.

70. Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1485-86 (2006) (citing AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 4 (2004)).

71. *See, e.g.*, Norman Leftstein, *The Movement Towards Indigent Defense Reform: Louisiana and Other States*, 9 LOY. J. PUB. INT. L. 125, 126 (2008) (explaining how the Louisiana Public Defender Board promulgates standards and guidelines for the defender officers across the state). In Massachusetts, the Committee for Public Counsel Services supervises all the public defender offices and the private lawyers assigned to criminal cases; *see* Committee for Public Counsel Services, <http://www.publiccounsel.net/> (last visited Aug. 19, 2010). In New York's Manhattan and Bronx Counties, oversight is provided by a Committee authorized by the Appellate Court Rules and staffed by Court appointees. *See infra* note 75 and accompanying text.

72. New York County Lawyers' Association, <http://www.nycla.org/publications/report2.htm> (last visited July 2, 2010).

73. TEN PRINCIPLES, *supra* note 41.

ability, training, and experience match the complexity of the case; and, most significantly, that staff attorney caseloads are manageable.⁷⁴

The overseeing authority should assess the defense offices periodically using the standards to measure the defense office. Finally, the overseeing authority's eventual report and recommendations should have some authority. Even the most insightful recommendations accomplish little if the authority lacks the power to impose sanctions on the defense office or the funding source or to effect change in some other way.

Serious evaluation of defense providers can be a powerful tool for improving the quality of defense services. New York City's experience is instructional. To oversee the organizations delivering defense services in the Bronx and Manhattan, the intermediate appellate court with jurisdiction over the counties created an oversight committee – the Indigent Defense Organization Oversight Committee (IDOO) – and appointed its members.⁷⁵ The IDOO began its work by drafting a set of guidelines.⁷⁶ Because it was impossible to actually watch and review individual attorney performance, IDOO designed standards that focused on the operation of the defense office and identified those factors which would most likely predict and produce quality performance.⁷⁷ This is exactly what the ABA did when it drafted standards for use in evaluating law schools. ABA accreditation teams cannot actually measure how well a school's graduates perform (although they do consider bar passage). Rather, the ABA looks at what a law school provides its students to facilitate their professional progress.⁷⁸ The ABA standards consider, among other factors, student-faculty ratios, the availability of clinical offerings, the availability of academic support, and the requirements for the JD degree, in the expectation that inputs predict outputs.⁷⁹

Correspondingly, the IDOO was less interested in the qualifications of the attorneys in a defender office than it was in how a defender office ensures that its lawyers are qualified; the committee was less interested in defining effective advocacy than in looking to see how a defender office ensures that its staff perform zealously.⁸⁰ IDOO members hoped that, if an office provided an excellent structure and sufficient support, the lawyers in that office would perform well. The committee's challenge was to identify objective measures that would predict quality. In that task, it looked to standards used

74. *Id.*

75. New York County Lawyers' Association, <http://www.nycla.org/publication-s/report2.htm> (last visited July 2, 2010).

76. See GEN. REQUIREMENTS FOR ALL ORGANIZED PROVIDERS OF DEF. SERVS. TO INDIGENT DEFENDANTS (1996), available at <http://www.nacdl.org/public.nsf/FreeForm/IndigentGuides?OpenDocument>.

77. Bernhard, *supra* note 66, at 27-29.

78. See Standards for Approval of Law Schools, <http://www.abanet.org/legal-ed/standards/standards.html> (last visited Aug. 19, 2010).

79. See *id.*

80. Bernhard, *supra* note 66.

by other jurisdictions and circulated drafts to the defense providers for their input. For example, the IDOOC selected the ratio of investigators and social workers to lawyers, whether the office established caseload limits, whether the office created its own performance standards, and whether it delivered training, supervision, and evaluation to the attorneys.⁸¹

The IDOOC lacks the authority to impose sanctions to bring non-compliant organizations into compliance, nor does it have the power to order the funding source (the city of New York) to better support the defense offices. Even with those caveats, there is reason to believe that the evaluative work of the IDOOC impacted the quality of service provided by the defender organizations. IDOOC reports consistently focused on the absence of caseload limits in the various defense providers.⁸² The IDOOC concluded that defenders working for the Legal Aid Society, the largest provider in the city, were routinely handling too many cases.⁸³ IDOOC reports drew attention to the issue of caseloads and supported the conclusion with real numbers not simply with anecdotal information.⁸⁴

The reports motivated the profession to work for change and built a factual foundation for the work that followed. In 1998, the IDOOC reported that Legal Aid was not meeting IDOOC standards because the organization was forced by the terms of its contract to accept far too many cases.⁸⁵ Building on that conclusion, over the next ten years, a series of bar association and court reports, media attention, legislative initiatives, and litigation began to change the quality of defense services provided to the poor in New York. Immediately after publication of the IDOOC's report in 1998, the Unified Court System recommended "an increase in rates for assigned counsel and urg[ed] the state to share the cost of assigned counsel with local governments."⁸⁶ Shortly thereafter, the New York County Lawyers' Association (NYCLA) filed a lawsuit alleging that defendants in the First Department who could not afford to hire lawyers were being denied their constitutional right to effective legal assistance due to the low rates of compensation paid to assigned counsel.⁸⁷ The New York County Supreme Court agreed with NYCLA's contention, and, as a result of the pressure of the court decision, the New York state legislature raised the rates of compensation paid to private attorneys who accept criminal cases across the city.⁸⁸ The New York State Bar Association in 2005 approved standards limiting lawyers' caseloads, requiring intensive

81. *Id.* at 28.

82. *Id.* at 30.

83. *Id.*

84. *Id.*

85. A History of Public Defense in New York State, The New York Civil Liberties Union, <http://www.nyclu.org/node/1480> (last visited July 30, 2010).

86. *Id.*

87. *Id.*

88. *Id.*

training for lawyers, and support staff for defense lawyers.⁸⁹ In 2009, the New York state legislature passed a statute limiting the number of criminal cases to which lawyers can be assigned.⁹⁰ Finally, the New York City American Civil Liberties Union filed a class action lawsuit, *Hurrell-Harring v. State*, which alleged that the lack of adequate funding, oversight, and state-wide standards denied New Yorkers accused of crimes their constitutional right to competent, qualified, and timely representation.⁹¹ The case survived a motion to dismiss.⁹²

Ensuring zealous representation for poor people accused of crime is difficult. But standards can help. Performance standards assist in attorney training, supervision, and evaluation, by clearly informing new lawyers what is expected of them in their new role – “a guide to professional conduct and performance” that provides “reasoned and appropriate professional advice.”⁹³ Eligibility guidelines are an essential component of any private bar plan. Organizational standards can be a force for change, operating on multiple levels: educational by informing the public about what goes into providing quality defense services; politically expedient for lobbying efforts or in litigation to leverage the funds necessary to allow an organization to meet its standards and for engendering support for increased spending; and, a yardstick against which to measure and from which to motivate performance. Drafting standards can be dull and tedious work. Busy offices understandably resist spending time on any efforts that do not directly benefit clients. But the investment in standards will pay dividends in multiple arenas.

89. *Id.*

90. *Breakthrough Legislation Establishes Criminal Defense Caseload Standards*, LEGAL AID SOCIETY, Apr. 6, 2009, <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/breakthroughlegislation.aspx>.

91. *Hurrell-Harring v. State*, 15 N.Y.3d 8, 15-16 (2010).

92. *Id.* at 16.

93. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 15, at 4-1.1 & cmt.